3-11-2013

State v. Anderson Respondent's Brief Dckt. 39227

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO,	)	
	)	No. 39227
Plaintiff-Respondent,	)	
	)	Idaho Co. Case No.
vs.	)	CR-2008-39246
	)	
RONALD E. ANDERSON,	)	
	)	
Defendant-Appellant.	)	
	)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE SECOND JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF IDAHO

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STATEMENT OF THE CASE

Nature Of The Case

Ronald E. Anderson appeals from the judgment and sentence entered upon the jury verdict finding him guilty of rape.

Statement Of Facts

A. The State's Case

At trial, the following evidence and testimony was presented by the state. The Lochsa Lodge is located in a remote part of northern Idaho, more than fifty miles from the nearest towns. (#36319 Tr., vol. 1, p.7, L.8 – p.9, L.9; p.11, Ls.1-10[1].) The employees of the lodge lived in trailers (or "bunkhouses") nearby. (#36319 Tr., vol. 1, p.11, L.12 – p.10, L.8.) The employees in each trailer shared a kitchen and common area, but each had a separate bedroom. (#36319 Tr., vol. 1, p.15, Ls.6-17; p.24, L.12 – p.29, L.7; see State's Exhibit 36.[2])

Shortly after midnight on June 5, 2008, Stephanie Morrison, a young waitress at the lodge's restaurant, ran into neighboring employee trailer #1 occupied by Richard

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[1] On May 17, 2012, this Court granted Anderson's motion to take judicial notice of the Clerks' Record and Reporter's Transcript in State v. Anderson, Supreme Court Docket No. 36319.

[2] On May 17, 2012, this Court granted Anderson's motion to take judicial notice of the "documents and transcripts included in the record for *State v. Anderson*, Supreme [Court] Docket No. 36319," but stated that "the exhibits submitted in the case listed above, are NOT included in this Order Granting Motion that the Court Take Judicial Notice and they will not be included unless specifically requested by the parties." (5/17/12 "Order Granting Motion that the Court Take Judicial Notice.") However, because the Clerk's Certificate Re: Exhibits in the current appeal includes the trial exhibits, judicial notice of the exhibits is unnecessary. (R., vol. 1, pp.172-178.)

MacDuff. (#36319 Tr., vol. 1, p.12, L.18 – p.13, L.3; vol. 2, pp.153, L.5 – p.154, L.24; p.160, Ls.8-21.) Stephanie was hysterical, was "kind of crying," she looked like she had been crying, and her eyes were red. (#36319 Tr., vol. 2, p.160, Ls.19-22; p.161, Ls.10-16; p.164, Ls.8-13; see also #36319 Tr., vol. 1, p.16, Ls.10-15 (Stephanie was still "very upset" about thirty minutes later).) The only clothing she wore was a tee-shirt which had blood on it, and she was naked from the waist down. (#36319 Tr., vol. 2, p.160, L.19 – p.161, L.9.) She wore no shoes, despite having had to cross rough gravel paths and ground covered with sticks to get to the next trailer. (#36319 Tr., vol. 1, p.41, L.2 – p.45, L.21; vol. 2, p.161, Ls.8-9; #36319, see State's Exhibits 7-11.) She had blood on her tee-shirt and wounds on her mouth and both upper and lower lips[3] that were, according to sexual assault nurse examiner Mary Pat Hansen,[4] consistent with being struck on the face; scratches on her back and thighs; and a large bruise on her chest

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[3] I.S.P. Officer Wiggins described the injuries he observed on Stephanie when he arrived at her trailer at about 1:10 a.m., as follows:

> The main injuries that I saw she had one severe cut to her lower lip. It was a pretty bad cut. Then there was three other cuts, not severe, but there was three other bad cuts to her upper and lower lips, combined three others, between her upper and lower lip. So, there was a total of four cuts, one pretty severe cut.

(#36319 Tr., vol. 1, p.19, Ls.10-16 (verbatim).)

[4] Ms. Hansen worked at the First Step Resource Center in Missoula, Montana, a clinic at St. Patrick Hospital, which responds to cases concerning suspected child abuse and adult sexual assault. (#36319 Tr., vol. 2, p.129, Ls. 3-12.) Ms. Hansen is a nurse practitioner with specialized training as a SANE nurse to "provide medical care . . . and as well as to provide evidence collection in cases of adult sexual assaults." (#36319 Tr., vol. 2, p.129, L.18 – p.130, L.14.) At the time of trial, Ms. Hansen had performed examinations in about 100 cases of adult sexual assault, all of them involving rape allegations. (#36319 Tr., vol. 2, p.131, Ls.9-21.)

(that became visible only later). (#36319 Tr., vol. 1, p.19, Ls.8-24; p.20, L.15 – p.22, L.17; p.63, Ls.5-19; vol. 2, p.118, L.18 – p.120, L.15; p.133, Ls.12-22; p.135, L.24 – p.143, L.9; p.147, Ls.15-18; p.160, L.24 – p.161, L.2; p.163, L.17 – p.164, L.4; State's Exhibits 1, 15-20, 23-27.) Stephanie also had a bite wound on the index finger of her right hand, which showed two distinct areas of injury. (#36319 Tr., vol. 1, p.22, L.18 – p.23, L.23; see State's Exhibits 15, 16, 28.)

Stephanie had fallen asleep on a couch in her trailer, and woke up to see fellow employee Ronald E. Anderson sitting on the couch with his pants down and masturbating. (#36319 Tr., vol. 2, p.173, L.19 – p.180, L.10.) When she tried to get to the front door to escape, Anderson tackled her by grabbing her legs, causing her to fall down. (#36319 Tr., vol. 2, p.182, Ls.11-22.) During Stephanie's struggle against Anderson, a bowl and a (clear) cup that were used as ashtrays were knocked onto the floor, scattering cigarette butts and ashes across the floor. (#36319 Tr., vol. 2, p.179, Ls.8-9; p.182, Ls.2-10; see State's Exhibits 21, 32.) Having tackled Stephanie onto the floor, Anderson began ripping her pants off. (#36319 Tr., vol. 2, p.180, L.11 – p.184, L.5.) Each time she tried to scream he hit her in the mouth. (#36319 Tr., p.183, Ls.19-21; p.184, L.22 – p.185, L.9; p.189, Ls.11-15.) Anderson also kneed Stephanie in the chest. (#36319 Tr., vol. 2, p.189, L.18.) Stephanie testified that Anderson was finally able to remove her pants, explaining:

> He was trying to take them off from the belt loops – or from the top of my pants . . . . And I was trying to hold my pants up, and he just kept ripping and ripping and ripping at my pants trying to get them off. And he ended up getting them off . . . .

(#36319 Tr., vol. 2, p.183, Ls.1-7.) He then physically overcame her resistance and raped her, penetrating her vagina with his penis (after spitting on his hand to lubricate his penis) on three separate periods of penetration as she tried to convince him to stop. (#36319 Tr., vol. 2, p.184, Ls.6-21; p.185, L.16 – p.188, L.23; p.190, Ls.1-8.) When Morrison tried to push him off by pushing at his face he bit her finger. (#36319 Tr., vol. 2, p.188, L.24 – p.189, L.10.) She managed to convince him to let her go to the sink for some water, and she ran from the trailer. (#36319 Tr., vol. 2, p.190, Ls.15-22.)

Richard MacDuff, a fellow employee in the trailer she ran to called the police. (#36319 Tr., vol. 2, p.164, L.14 – p.165, L.3.) The responding officer, Idaho State Police patrol officer Stan Wiggins, saw Anderson walking around when he first arrived, but Anderson was in his cot when ultimately arrested. (#36319 Tr., vol. 1, p.14, Ls.10-21; p.35, L.5 – p.37, L.22.) After Stephanie was transported to St. Patrick's Hospital in Missoula for a sexual assault examination that evening, Officer Wiggins entered Stephanie's trailer, and observed,

> [J]ust as you come into the living room common area to the left on the floor was a pair of blue jeans with a pair of women's underpants attached to them that, in my opinion, the only way – they were turned inside out and the underwear was still attached to the pants. It appeared where they had been pulled off and pulled inside out and then dropped and they were on the floor at that point right there.

(#36319 Tr., vol. 2, p.30, Ls.1-9; p.194, Ls.15-23; see State's Exhibits 21, 30, 31.)

Anderson eventually admitted to having sexual contact with Morrison, but claimed it was consensual. (#36319 Tr., vol. 2, p.208, L.18 – p.210, L.10; p.216, L.13 – p.258, L.4.)

B. Anderson's Testimony

At trial, Anderson testified that, while he was drinking beer in the tavern area at the lodge and playing pool in the early evening, Stephanie was there and had an argument with her boyfriend, Chris Prall. (#36319 Tr., vol. 2, p.237, L.13 – p.239, L.16.) Stephanie then she gave Anderson three hugs, the third hug drawing Chris's notice. (#36319 Tr., vol. 2, p.239, L.18 – p.241, L.7.) When Anderson had run out of money to buy drinks, Stephanie offered to give him $25, which he refused, but she later gave him $15. (#36319 Tr., vol. 2, p.240, L.16 – p.242, L.1.) Anderson went to his cabin for a while and returned to the bar at about 8:30 or 9:00 that evening. (#36319 Tr., vol. 2, p.242, L.17 – p.243, L.12.) While Anderson was at the bar, Jason Black informed him that Stephanie had said she wanted to "get with you," and "she wanted a certain thing from a certain person, which he was indicating [Anderson] as being that person." (#36319 Tr., vol. 2, p.245, L.13 – p.247, L.22.) After Jason continued to tell Anderson he "should go check [Stephanie] out," Jason and Anderson returned to Anderson's cabin, and Jason drove Anderson to Stephanie's trailer – where Jason also lived – and the two went into the trailer together and found Stephanie sitting on the couch. (#36319 Tr., vol. 2, p.247, L.19 - 248, L.25.) Jason left the trailer shortly after he escorted Anderson inside, and when Anderson told Stephanie about what she had reportedly said to Jason about wanting to "get with" Anderson, she responded, "maybe." (#36319 Tr., vol. 2, p.250, L.15 – p.251, L.12.)

Anderson left the room to go to the bathroom and Stephanie was covered with a quilt, but when he returned, she did not have a top on, and he took that as an

"invitation." (#36319 Tr., vol. 2, p.251, Ls.14-19.) Anderson asked Stephanie if she was "cool with this" and she said she was and then she "went for [his] private part." (#36319 Tr., vol. 2, p.251, Ls.19-24.) Anderson testified that they "proceeded in like an oral sex, if you will," and when she was doing that,

> She went for her bottoms, which I helped her pull off. But as we was pulling them off I was like this. But then she was pushing, and I took them from the tip part. So how they came out the way they did is a mystery to me.

(#36319 Tr., vol. 2, p.252, Ls.21 (verbatim).) Anderson explained that he put a condom on and "proceeded to have oral sex with her, too" (#36319 Tr., vol. 2, p.252, L.22 – p.253, L.3.) Anderson testified that he and Stephanie engaged in sexual intercourse "missionary style," and during the intensity of the "bumping and grinding, whatever you want to put it, her head – she said, you got a hard head, and she was talking about this head because it did hit her in the mouth." (#36319 Tr., vol. 2, p.253, L.20 – p.254, L.1 (verbatim).) Anderson noticed Stephanie had a "busted lip" and when he asked her if she was alright "[s]he just laughed it off." (#36319 Tr., vol. 2, p.254, Ls.4-6.) Anderson "came up out of her and went to the bathroom," and when he returned, she "blotted her mouth a little[,]" and they re-engaged in sexual intercourse, as Anderson testified, in "DOG style." (#36319 Tr., vol. 2, p.254, Ls.6-15 (capitalization original).) When asked by his counsel, "you had sex with you behind her?" he responded "[y]es[,]" and further volunteered:

> And it wasn't forced at all because I know the thing she was telling me, I'm not saying we're in love, but it wasn't no type of resistance whatsoever.

(#36319 Tr., vol. 2, p.254, Ls.19-22 (grammar and punctuation verbatim).) When Anderson and Stephanie were getting ready to return to the "missionary" position, things changed; according to Anderson, "she didn't exactly totally resist, but she seemed like she was flipping out over something, as far as like she said she made a statement like, this is not right, I don't think this is right . . . [a]nd then she said, they set you up." (#36319 Tr., vol. 2, p.255, L.12 – p.256, L.9.) When Stephanie "started acting real weird[,]" Anderson got up to go to the bathroom to "discharge" his condom, and when he came back, she was gone. (#36319 Tr., vol. 2, p.256, Ls.17-24.) Anderson testified that he never ejaculated, and he never took his shirt off during the time he was having sex with Stephanie. (#36319 Tr., vol. 2, p.256, L.22 – p.257, L.9.)

After Stephanie left her trailer, Anderson got dressed and was just sitting there, not knowing what was happening, and as he was "getting ready to put [his] shoes on Jason Black bust[ed] through the door, him and Andy Hart." (#36319 Tr., vol. 2, p.258, Ls.5-13.) Andy told Anderson that the "cops are on their way[,]" and that he should go back to his own cabin until they arrived, so that is what Anderson did. (#36319 Tr., vol. 2, p.258, L.25 – p.259, L.6.) As Anderson walked on the road toward his cabin, Officer Wiggins drove his patrol car past Anderson. (#36319 Tr., vol. 2, p.259, Ls.13–22.) Anderson went to his cabin, and told his roommate, Phil Wesseler, that he didn't know "what the Hell is going on but this chick up there, she is flipping out." (#36319 Tr., vol. 2, p.260, Ls.21-22.) Phil calmed Anderson down and told him to get some rest, so Anderson ate a sandwich, smoked a cigarette, and went to sleep. (#36319 Tr., vol. 2, p.261, Ls.2-6.) When Officer Wiggins arrived at the cabin, Phil woke Anderson up, and

Officer Wiggins placed Anderson under arrest. (#36319 Tr., vol. 2, p.261, L.9 – p.262, L.18.)

Course Of Proceedings

The state charged Anderson with rape. (#36319 R., pp.14-15.) After trial, the jury convicted Anderson of that offense. (#36319 R., p.50.) Anderson moved for a new trial. (#36319 R., p.92.) Although not asserted originally as a basis for the motion, at a later hearing Anderson's counsel stated that the defense had located Jason Black, who lived in the same housing unit as Stephanie on the night of the rape, and asserted that his testimony would constitute newly discovered evidence. (#36319 Tr., vol. 2, p.299, L.17 – p.302, L.2; see also, Affidavit of Gregory C. Dickison (augmentation).) The district court received testimony from Black regarding the night of the rape and his whereabouts between that night and the trial. (#36319 Tr., vol. 2, p.315, L.22 – p.346, L.8.) The district court granted Anderson a new trial. (#36319 R., pp.112-126.) However, after the state appealed from that order (#36319 R., pp.127-130), the Idaho Court of Appeals reversed the district court's order, reinstated Anderson's judgment of conviction, and remanded the case for sentencing. State v. Anderson, Docket No. 36319, 2010 Unpublished Opinion No. 610 (Idaho App., August 25, 2010). Upon remand, the district court sentenced Anderson to a unified sentence of eighteen years with nine years fixed. (R., vol. 1, pp.161-163[5].) Anderson filed a Rule 35, I.C.R., motion

[5] The Clerk's Record in the current appeal, Idaho Supreme Court Docket No. 39227, contains two undifferentiated volumes. The larger of the two volumes, which contains the Register of Action beginning at page 1, will be cited as volume 1, and the smaller volume as volume 2.

for reduction of sentence which was denied. (R., vol. 2, pp.98-100, 106-107.) Anderson appeals from his judgment of conviction. (R., vol. 1, pp.164-166.)

ISSUES

Anderson states the issues on appeal as:

1. Whether the district court erred by failing to preserve the post-proof jury instructions in the record, thus depriving Mr. Anderson of his right to due process.

2. Whether Mr. Anderson's conviction should be vacated because of prosecutorial misconduct by vouching for evidence, misstating the law, disparaging the defense, and commenting on the veracity of Mr. Anderson's testimony.

3. Whether the accumulation of errors in this case deprived Mr. Anderson of a fair trial.

(Appellant's Brief, p.13.)

The state rephrases the issues on appeal as:

1. Has Anderson failed to show a violation of his due process right to an adequate appellate record?

2. Has Anderson failed to show he is entitled to relief on any of his prosecutorial misconduct claims?

3. Has Anderson failed to show cumulative error?

ARGUMENT

I.
Anderson Has Failed To Show A Violation Of His Due Process Right To An Adequate Appellate Record

A. Introduction

On appeal, this Court granted Anderson's motion to augment the appellate record with the post-proof jury instructions. (11/2/12 Order Granting Motion (etc.).) However, Kathy Johnson, an employee of the Idaho County Court Clerk's office, responded by submitting an affidavit to this Court stating that she examined the district court file and determined that Jury Instruction Nos. 1 through 9 "are the same as are in the court file," which indicated that Jury Instruction Nos. 9 through 20 are not.[6] (11/28/12 Affidavit of Kathy Johnson.)

Anderson argues that, "[b]y failing to preserve a written copy of the post-proof instructions, the district court deprived [him] of an adequate appellate record and violated his due process rights[,]" and therefore, his conviction should be vacated. (Appellant's Brief, p.17.) Anderson's claim of a due process violation fails because he has failed to demonstrate that the absence of the written form of Instructions 9 through 20 from the appellate record has prejudiced him in the pursuit of his appeal, especially in light of the fact that the record includes a transcription of the district court's verbal rendition of those same instructions to the jury.

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[6] The state has confirmed with Ms. Johnson that Jury Instruction Nos. 9 through 20 are missing from the district court's file, and cannot be located.

B. Standard Of Review

The standard of appellate review applicable to constitutional issues such as claimed due process violations is one of deference to factual findings, unless they are clearly erroneous, but free review of whether constitutional requirements have been satisfied in light of the facts found. State v. Bromgard, 139 Idaho 375, 380, 79 P.3d 734, 739 (Ct. App. 2003); State v. Smith, 135 Idaho 712, 720, 23 P.3d 786, 794 (Ct. App. 2001).

C. Anderson Has Failed To Show That The Lack Of Written Jury Instruction Nos. 9 Through 20 Has Prejudiced His Ability To Pursue His Appeal

A defendant in a criminal case has a due process right to a "record on appeal that is sufficient for adequate appellate review of the errors alleged regarding the proceedings below." State v. Strand, 137 Idaho 457, 462, 50 P.3d 472, 477 (2002). In addition, although legal requirements to create a record are mandatory, failure to do so is not automatically reversible error. State v. Wright, 97 Idaho 229, 231-33, 542 P.2d 63, 65-67 (1975); State v. Cheatham, 139 Idaho 413, 415, 80 P.3d 349, 351 (Ct. App. 2003). To demonstrate that the record is not sufficient, the defendant must show that any omissions from the record prejudiced his ability to pursue his appeal. State v. Polson, 92 Idaho 615, 620-21, 448 P.2d 229, 234-35 (1968); Cheatham, 139 Idaho at 415, 80 P.3d at 351. "[T]o require reversal, some specific error or prejudice resulting from failure to record such proceedings must be called to the court's attention." Wright, 97 Idaho at 233, 542 P.2d at 67; see also State v. Lovelace, 140 Idaho 53, 65, 90 P.3d 278, 290 (2003) ("[E]rror in the abstract does not necessarily rise to the level of

constitutional dimension unless and until a defendant properly presents a specific prejudice from such error.").

Anderson's claim of a due process violation rests upon the fact that the district court's written post-proof Jury Instructions 9 through 20 are missing from the appellate record. (Appellant's Brief, pp.14-17.) Although a transcript of the district court's entire verbal instructions to the jury is part of the appellate record, Anderson argues, "[t]he fact that he cannot review the language in [the written] instructions or the manner in which it [sic] was presented demonstrates prejudice." (Appellant's Brief, p.17, n.14.) Despite his claim, Anderson has failed to establish a due process violation because he has failed to show that the absence of the written form of Instructions Nos. 9 through 20 from the appellate record has actually prejudiced his ability to pursue his appeal. See, e.g., Polson, 92 Idaho at 620-21, 448 P.2d at 234-35; Cheatham, 139 Idaho at 415, 80 P.3d at 351. Anderson's claim of prejudice is unavailing because he has failed to identify specifically what it is about the missing written jury instructions that he wishes to challenge, or even could challenge in light of the existing record -- which includes a transcript of the district court's reading of Jury Instructions Nos. 9 through 20 to the jury. (See Tr., p.84, L.9 – p.90, L.25.)

Anderson cites several cases in support of his statement that "[t]he Idaho Supreme Court has consistently held that, when the inadequate appellate record is caused by the district court's failure to maintain an adequate record below, *abstract prejudice constitutes constitutional error.*" (Appellant's Brief, p.17 (emphasis added).) However, none of the cases Anderson cites suggest that "abstract prejudice constitutes

constitutional error." The prejudice claimed in those cases was much defined. See Martinez v. State, 92 Idaho 148, 438 P.2d 893 (1968) (failure to maintain a transcript of the arraignment hearing deprived Martinez of the ability to establish he was not advised of his right to have an attorney appointed if he could not afford one); Ebersole v. State, 91 Idaho 630, 428 P.2d 947 (1967) (judgment reversed in the absence of any transcript or court minutes of arraignment where defendant pled guilty allegedly without knowingly and intelligently waiving his right to counsel); State v. Zielinski, 119 Idaho 316, 805 P.2d 1240 (1991) (the absence of any record of testimony establishing probable cause for a search warrant denied defendant's ability to challenge the probable cause finding). Contrary to Anderson's assertion that "abstract prejudice constitutes constitutional error," the only case cited by Anderson employing the word "abstract" in this context, appears to say otherwise, to wit:

> "We do not agree that the failure to record closing argument is *per se* a denial of due process. Error in the abstract does not necessarily rise to the level of constitutional dimensions unless and until a defendant properly presents specific prejudice resulting from such error."

State v. Walters, 120 Idaho 46, 49, 813 P.2d 857, 860 (1991) (quoting State v. Wright, 97 Idaho 229, 231, 542 P.2d 63, 65 (1975)).

Anderson also argues that "the Idaho Supreme Court has found error where the *manner* in which the instructions are presented is inappropriate, even though the language of the instruction parrots the relevant statute[,]"[7] citing State v. Draper, 151 Idaho 576, 589-592, 261 P.3d 853, 866-869 (2011). (Appellant's Brief, p.16 (emphasis

[7] The Idaho Supreme Court's decision in Draper did not state that the jury instruction on conspiracy to commit murder "parrot[ed]" or otherwise mirrored the relevant statute. See Draper, 151 Idaho at 589-592, 261 P.3d at 866-869.

added).) He then reasons that, "in order to allow for an adequate review of the jury instructions – both the language used and the manner in which it presented the instructions – the written copy sent with the jury needs to be preserved in the record." (Id.) Anderson's reliance on Draper is misplaced. The error in Draper was that the seventh element of the crime of conspiracy to commit murder – that "such act was done for the purpose of carrying out the agreement" – was misnumbered as if it were the fifth possible overt act, an error which may have effectively omitted both the "overt act" and "purpose" elements of conspiracy. Draper, 151 Idaho at 589-592, 261 P.3d at 866-869 ("Draper's jury instructions for conspiracy, as read to the jury and as included in the record as the original instructions, changed the seventh element of the instruction to be a fifth "overt act.") Draper does not support the notion that when written jury instructions are missing from the appellate record, reversal is warranted merely because a defendant is denied the ability to challenge the "manner" in which they were presented. See Walters, 120 Idaho at 49, 813 P.2d at 860 (rejecting rule of *per se* prejudice); Wright, 97 Idaho at 231-233, 542 P.2d at 65-67 (same). Moreover, Anderson fails to specifically divulge what was improper about the manner in which written Jury Instruction Nos. 9 through 20 were presented to the jury. See Lovelace, 140 Idaho at 65, 90 P.3d at 290; Polson, 92 Idaho at 620-21, 448 P.2d at 234-35; Cheatham, 139 Idaho at 415, 80 P.3d at 351.

In sum, Anderson does not point to any specific error in the court's written form of Jury Instruction Nos. 9 through 20, nor does he divulge in what way the manner in

which the court presented those written Instructions may have been flawed. Anderson has failed to establish a violation of his due process rights.

II.
Anderson Has Failed To Show He Is Entitled To Relief On Any Of His Prosecutorial Misconduct Claims

A. Introduction

Anderson argues that the prosecutor committed several instances of misconduct that prejudiced his right to a fair trial. (Appellant's Brief, pp.18-29.) Anderson has failed to establish any basis for reversal, however, because he has failed to carry his burden of demonstrating that the prosecutor's remarks during closing argument, to which he did not object, amount to fundamental error.

B. Standard Of Review And General Legal Standards Governing Claims Of Prosecutorial Misconduct

"[T]he standard of review governing claims of prosecutorial misconduct depends on whether the defendant objected to the misconduct at trial." State v. Severson, 147 Idaho 694, 715, 215 P.3d 414, 435 (2009). If the alleged error was followed by a contemporaneous objection at trial, the defendant bears the initial burden on appeal of establishing that the complained of conduct was improper. State v. Ellington, 151 Idaho 53, 59, 253 P.3d 727, 733 (2011); State v. Perry, 150 Idaho 209, 227, 245 P.3d 961, 979 (2010). "Where the defendant meets his initial burden of showing that a violation occurred, the State then has the burden of demonstrating to the appellate court beyond a reasonable doubt that the constitutional violation did not contribute to the jury's verdict." Perry, 150 Idaho at 227-228, 245 P.3d at 979-980. When, on the other hand,

a defendant fails to timely object at trial to allegedly improper closing arguments by the prosecutor, the conviction will be set aside for prosecutorial misconduct only upon a showing by the defendant that the alleged misconduct rises to the level of fundamental error. Id. at 228, 245 P.3d at 980.

Whether preserved by objection at trial or reviewed for fundamental error, a mere assertion or finding that a particular question or statement was objectionable or improper is insufficient to establish prosecutorial misconduct. As explained by the United States Supreme Court: "[I]t is not enough that the prosecutors' remarks were undesirable or even universally condemned. The relevant question is whether the prosecutors' comments so infected the trial with unfairness as to make the resulting conviction a denial of due process." Darden v. Wainwright, 477 U.S. 168, 181 (1986) (internal quotations and citations omitted); see also Smith v. Phillips, 455 U.S. 209, 219 (1982) ("[T]he touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor.") State v. Reynolds, 120 Idaho 445, 451, 816 P.2d 1002, 1008 (Ct. App. 1991) (the function of appellate review is "not to discipline the prosecutor for misconduct, but to ensure that any such misconduct did not interfere with the defendant's right to a fair trial").

C. Anderson Has Failed To Show Fundamental Error With Respect To His Unpreserved Claims Of Prosecutorial Misconduct During Closing Argument

As previously explained, an unpreserved issue may only be considered on appeal if it "constitutes fundamental error." State v. Johnson, 149 Idaho 259, 265, 233 P.3d 190, 196 (Ct. App. 2010). In the absence of an objection "the appellate court's

authority to remedy that error is strictly circumscribed to cases where the error results in the defendant being deprived of his or her Fourteenth Amendment due process right to a fair trial in a fair tribunal." Perry, 150 Idaho at 224, 245 P.3d at 976. Review without objection will not lie unless the defendant demonstrates that (1) "one or more of the defendant's unwaived constitutional rights were violated;" (2) the constitutional error is "clear or obvious" on the record, "without the need for any additional information" including information "as to whether the failure to object was a tactical decision;" and (3) "the error affected the defendant's substantial rights," generally by showing a reasonable probability that the error "affected the outcome of the trial proceedings." Id. at 226, 245 P.3d at 978 (footnote omitted).

On appeal, Anderson raises a variety of claims of prosecutorial misconduct that he argues constitute fundamental error. (Appellant's Brief, pp.18-2938.) All but two of the comments were appropriate for the prosecutor to make during closing argument, and the two comments that were improper do not rise to the level of fundamental error.

1. Most Of The Prosecutor's Comments During Closing Argument Were Proper

A prosecutor may "express an opinion in argument as to the truth or falsity of testimony . . . when such an opinion is based upon the evidence." State v. Timmons, 145 Idaho 279, 288, 178 P.3d 644, 653 (Ct. App. 2007). A prosecutor may also argue "that the state's evidence and theory of the case [is] more convincing." State v. Gross, 146 Idaho 15, 20, 189 P.3d 477, 482 (Ct. App. 2008). "While the use of disfavored phrases such as 'I think' and 'I believe' is discouraged, it is misconduct only when the

prosecutor attempts to use his official position or his personal knowledge of the case as a means of inducing the jury to vote for conviction." State v. Marmentini, 152 Idaho 269, 272, 270 P.3d 1054, 1057 (Ct. App. 2011) (citing State v. Phillips, 144 Idaho 82, 86 n.1, 156 P.3d 583, 587 n.1 (Ct. App. 2007); State v. Rosencrantz, 110 Idaho 124, 131, 714 P.2d 93, 100 (Ct. App. 1986)). A prosecutor's opinions and argument do not constitute vouching unless the prosecutor interjects "personal belief" regarding the evidence or a witness's credibility, Timmons, 145 Idaho at 289, 178 P.3d at 654, or asks jurors "to make their decision based upon ... the prosecutor's self-proclaimed moral rectitude and integrity rather than addressing the evidence," Gross, 146 Idaho at 20, 189 P.3d at 482.

(a). Vouching

Anderson argues that the prosecutor improperly vouched for the state's evidence and against the defense's evidence in his closing argument, and that such comments constitute fundamental error. (Appellant's Brief, pp.20-22.) However, review of the prosecutor's comments reveals that they were not improper because they were based upon the evidence presented, and even if one or more of the comments were improper, no constitutional rights of Anderson's were implicated.[8]

[8] The challenged comments (see Appellant's Brief, pp.20-22) are:

(1). "I thought the nurse practitioner was very credible. I think she adds credence to the State's case. She testified that the injuries to Stephanie's face were consistent with being punched in the face." (Tr., p.96, L.25 – p.97, L.4.)

(2) "That story that Mr. Anderson told you was so unbelievable and uncredible there was no reason to cross him. And I gladly ask you to bring your own common sense into this case, because if you do

When taken in context, the prosecutor's statements in this case cannot reasonably be construed as impermissible vouching. First, after the prosecutor said the nurse practitioner "was very credible," he immediately explained that she "adds credence to the State's case," noting that she "testified that the injuries to Stephanie's face were consistent with being punched in the face," just as Stephanie had testified. (Tr., p.96, L.25 – p.97, L.4.) In essence, the prosecutor merely explained that the injuries seen on Stephanie, combined with her testimony about how they were caused, made Ms. Hansen's testimony very credible – an opinion of her credibility based upon the evidence presented at trial.

Second, the prosecutor's comment that Anderson's story was "unbelievable and uncredible [sic]," and, using common sense, "there's no way in the world you can believe Mr. Anderson's story," is a permissible opinion based on the testimony Anderson gave at trial. Timmons, 145 Idaho at 288, 178 P.3d at 653; Gross, 146 Idaho

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there's no way in the world you can believe Mr. Anderson's story." (Tr., p.117, Ls.14-19.)

(3) "So to bring this out – again, when you don't have a good story to tell, and Mr. Anderson has had a long time to come up with a good story, and that was a terrible story. I'm surprised he didn't come up with something better." (Tr., p.118, Ls.19-23.)

(4) "[Defense counsel] never – he never talked to you about his client's version of the events except one or two times. Why? Because it's an unbelievable story." (Tr., p.120, L.25 – p.121, L.2.)

(5). "[t]he defense – they want to come up with stories how [the injuries] happened some way else – happened some other way. They can't get around it. And they come up with these stories that are not believable, but yet they throw them out to you and want you to believe them. I mean, my gosh, this is great evidence." (Tr., p.123, Ls.2-8.)

at 20, 189 P.3d at 482; see "Anderson's Testimony," pp.4-8, supra; Argument II, § C.3, infra.

Third, the prosecutor's comment that Anderson didn't have a good story to tell, had a long time to come up with a good story, that his story was terrible, and he was surprised Anderson didn't come up with something better, were all based on Anderson's highly suspect testimony that Stephanie sent a message through Anderson's friend at the bar that she desired Anderson's "thing," that he went to her trailer later where she invited sexual contact by unexpectedly exposing her breasts to him, that they both engaged in oral sex before having sexual intercourse during which time she injured her lips when his head hit her mouth, and she ran out of the trailer for no apparent reason naked from the waist down and hysterical. ("Anderson's Testimony," pp.4-8, supra.)

Fourth, the prosecutor's comment that Anderson's attorney only discussed Anderson's testimony one or two times because it was an unbelievable story (Tr., p.118, Ls.19-23) was appropriate in light of the fact that it was true that defense counsel gave little attention to Anderson's testimony, and it was obviously due to the audaciousness of Anderson's story. The prosecutor's comment was based on the evidence presented.

Finally, the prosecutor's comment that the defense wanted to "come up with stories" how Stephanie's injuries occurred, but came up with "stories that are not believable, but yet they throw them out to you and want you to believe them[,]" was not improper argument. (Tr., p.123, Ls.2-8.) Portions of the defense attorney's closing argument the prosecutor may have been responding to include: (1) Stephanie's lips were injured because she received "a cut on her lip or a bump on her lip from being at

Lolo Hot Springs[,]" (2) Stephanie's lips were injured "while they were having sexual intercourse . . . [and] they bumped heads[,]" (3) Stephanie received scratches on her legs when she "ran through that underbrush" to Richard MacDuff's trailer, (4) the "only bruise that the State has presented to you is right above her right breast, two small bruises eight days later[,] [t]hat's it[,]" (5) if Anderson punched Stephanie four or five times on the mouth, his hands should have had marks on them, and (6) there was no answer to the question what motive Stephanie had to "cry rape." (Tr., p.109, L.8 – p.111, L.5; p.114, Ls.9-11.)

Responding specifically to defense counsel's explanation of Stephanie's scratches on her body, the prosecutor next explained, "this is great evidence. All these cuts to her buttocks, her hips, which is – as I said earlier is consistent with the pants being pulled off, and the pants being pulled off that's just how they were. That's totally consistent with what she testified to that they were pulled off from the hip inside out." (Tr., p.123, Ls.2-13.) The prosecutor's comments and opinions were properly based on the evidence presented at trial. Timmons, 145 Idaho at 288, 178 P.3d at 653; Gross, 146 Idaho at 20, 189 P.3d at 482. Because all of the prosecutor's comments Anderson cites as improper "vouching" were based on evidence presented at trial, rather than on personal belief, Anderson has failed to establish error. Moreover, the comment that "this is great evidence," was also made in response to the main theme of Anderson's closing argument – that the state presented no evidence showing Anderson committed rape. (Tr., p.101, Ls.1-4; p.104, Ls.5-6; p.105, L.24 – p.107, L.6; p.109, L.6 – p.110, L.21; p.111, Ls.15-19; p.113, Ls.9-10; p.115, Ls.15-19.)

Even if one or more comments by the prosecutor constituted improper vouching, such misconduct did not clearly violate any of Anderson's *constitutional* rights, and cannot be the basis for finding fundamental error under Perry, which explained:

> By the time of closing argument, the prosecutor had been warned twice by the district court about the impropriety of eliciting vouching testimony from the witnesses. Nevertheless, the prosecutor went on to refer to the vouching testimony . . . . There was no excuse for this conduct and it was clearly improper. Therefore, the prosecutor's statements during closing argument constitute misconduct. *However, such misconduct did not clearly violate any of Perry's constitutional rights, and it therefore cannot constitute fundamental error.*

Perry, 150 Idaho at 230, 245 P.3d at 982 (emphasis added).

Anderson cites no authority that holds that a prosecutor who vouches for testimony or evidence during closing argument violates a defendant's due process right to a fair trial. (See Appellant's Brief, pp.20-22.) As transposed for this case, "[t]he prosecutor's actions did not go to the foundation of [Anderson's] case or implicate any of his constitutional rights." State v. Severson, 147 Idaho 694, 717, 215 P.3d 414, 437 (2009). Anderson has failed to show any violation of his constitutional rights by the prosecutor's comments, much less that such violations are clear or obvious on the record (etc.). Perry, 150 Idaho at 226, 245 P.3d at 978. Anderson has thus failed to establish fundamental error entitling him to appellate review of his prosecutorial misconduct claims of vouching.

(b). Shifting The Burden Of Proof

Anderson contends that the prosecutor improperly shifted the burden of proof to him when the prosecutor told the jury:

> And you've got to come up with something. If you're the defense, what do you do? You've got to attack. You can't just sit back and say nothing. You've got to come up with some story. . . .
>
> . . .
>
> That's a ridiculous argument. But, again, you've got to come up with something.

(Tr., p.120, Ls.16-19; p.121, Ls.24-25; Appellant's Brief, pp.22-24.)

Rather than shifting the burden of proof onto Anderson to produce evidence, the prosecutor's comments concerned the evidence already produced at trial, especially Anderson's testimony. The prosecutor was opining that Anderson could do little to rebut the state's case -- especially to explain Stephanie's injuries – and that his testimony carried so little validity that it appeared to be an attempt by Anderson to "come up with something" to defend himself. The prosecutor's comments did not tell the jury that Anderson had any burden to produce evidence or that the state's burden was less than "proof beyond a reasonable doubt." In saying that "you've got to come up with something," the prosecutor obviously took into account that Anderson had, in fact, testified, and was stating his opinion that such testimony was so lacking in believability that Anderson appeared to have been desperate in selecting the storyline to support his

defense.[9] Anderson has failed that to show that the prosecutor's comments were improper, much less that they violated his due process right to a fair trial.

(c). Disparagement

Anderson next asserts that the prosecutor committed misconduct by maligning the defense in a variety of ways,[10] including referring to the defense arguments as ridiculous, unbelievable, and smoke and mirrors. (Appellant's Brief, pp.24-26.) In Idaho, the prosecutor's closing argument should not include disparaging comments

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[9] Anderson's attempt to equate the prosecutor's comments to the situation in State v. Erickson, 148 Idaho 679, 227 P.3d 933 (Ct. App. 2010) is misplaced. (See Appellant's Brief, p.24.) In Erickson, not only did the prosecutor tell the jury that he could not bring it the perfect case, but by "suggesting that the jury should 'set the standard' for the prosecutor and law enforcement in Bear Lake County 'on what [a jury is] going to accept as proof of child molestation,' the prosecutor invited the jury to create its own standard of proof instead of applying the reasonable doubt standard stated in its jury instructions." 148 Idaho at 686, 227 P.3d at 940.

[10] Anderson cites the following comments by the prosecutor as also disparaging:

> So to bring this out – again, when you don't have a good story to tell, and *Mr. Anderson has had a long time to come up with a good story, and that was a terrible story.* I'm surprised he didn't come up with anything better. (Tr., p.118, Ls.19-23 (emphasis original).)
>
> *That's a ridiculous argument.* But, again, you've got to come up with something. (Tr., p.121, Ls.17-25 (emphasis original).)
>
> And you've got to come up with something. If you're the defense, what do you do? You've got to attack. You can't just sit back and say nothing. You've got to come up with some story. (Tr., p.120, Ls.16-19.)
>
> You know, when the defense doesn't have – when they have a defendant that comes up with an unbelievable story they've got to use smoke and mirrors. They've got to attack the State. (Tr., p.117, Ls.7-10.)

(See Appellant's Brief, pp.25-26.)

about opposing counsel. State v. Phillips, 144 Idaho 82, 86, 156 P.3d 583, 587 (Ct. App. 2007). However, none of the prosecutor's comments in Anderson's case were directed at defense counsel personally, but rather were comments on the defense theories. Therefore, the prosecutor's comments that the defense arguments were ridiculous and smoke and mirrors was not misconduct. State v. Norton, 151 Idaho 176, 189, 254 P.3d 77, 90 (Ct. App. 2011) ("We conclude that the prosecutor's rebuttal argument referring to some of defense counsel's arguments as red herrings and smoke and mirrors was not misconduct.").

2. The Two Comments By The Prosecutor That May Have Been Objectionable Did Not Deny Anderson His Due Process Right To A Fair Trial

Anderson challenges two comments made by the prosecutor during his rebuttal argument that may have been objectionable. First, the prosecutor said, "I was a criminal defense attorney for 15 years. I've been a prosecutor for four years, and this in my – this is some of the best evidence I've presented." (Tr., p.120, Ls.13-16.) Although it is not improper for a prosecutor to opine about the quality of the evidence if based on the evidence presented, to the extent mentioning his experience as a defense attorney and a prosecutor was an attempt to bolster the state's evidence with the "prestige of the State" (see Appellant's Brief, p.21), it may have been improper. See State v. Wheeler, 149 Idaho 364, 368, 233 P.3d 1286, 1290 (Ct. App. 2010). ("A prosecutor can improperly vouch for a witness by placing the prestige of the state behind the witness or referring to information not given to the jury that supports the witness.") However, such misconduct by the prosecutor did not clearly violate any of Anderson's constitutional

rights, and cannot be the basis for finding fundamental error under Perry, 150 Idaho at 230, 245 P.3d at 982.

Anderson cites no authority to support his claim that a prosecutor who vouches for testimony or evidence during closing argument by using the prestige of his or her office or reputation, violates a defendant's due process right to a fair trial. (See Appellant's Brief, pp.20-21.) As stated previously, "[t]he prosecutor's actions did not go to the foundation of [Anderson's] case or implicate any of his constitutional rights." Severson, 147 Idaho at 717, 215 P.3d at 437. Therefore, Anderson has failed to show any violation of his constitutional rights by the prosecutor's comment, much less that such violation is clear or obvious on the record. Perry, 150 Idaho at 226, 245 P.3d at 978.

The same is true of the second comment by the prosecutor, which was obviously objectionable:

> I found it interesting, too, that [defense counsel] in his closing he hardly even mentioned Mr. Anderson's testimony. There was only one or two references to when he testified about his story. I find that interesting. I mean, all he did was argue to you that the police didn't do a good job. He never – he never talked to you about his client's version of the events except one or two times. Why? Because it's an unbelievable story. And it's uncredible, and it doesn't look good to stand up there and talk about his client's story, *because he knows—I would submit to you the reason is is because he knows it's not a good story.*

(Tr., p.120, L.19 – p.121, L.6 (verbatim).)

Telling the jury that the defense attorney did not discuss Anderson's testimony during closing argument because he "knows it's not a good story" was improper. (See Appellant's Brief, p.25.) However, such a comment cannot reasonably be construed as

suggesting to the jury "that defense counsel has knowingly elicited false testimony," as Anderson argues. (Id.) Speculating on what defense counsel believes about the quality of a defendant's testimony is not the same as saying the attorney "knowingly elicited false testimony." Because it is not "plain on the record" that the prosecutor, in effect, accused defense counsel of eliciting false testimony, Anderson has failed to meet the second prong of Perry.

The prosecutor's comment was admittedly improper because he told the jury that opposing counsel knew (or believed) that Anderson's testimony did not present a *good* story – not that it was not true. Although the prosecutor's comment may have been "misconduct," it did not "implicate any of [Anderson's] constitutional rights," so it does not meet the first or second prongs for fundamental error under Perry.[11] See Perry, 150 Idaho at 230, 245 P.3d at 982; Severson, 147 Idaho at 717, 215 P.3d at 437.

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[11] Anderson cites two pre-Perry cases to support his claim. (Appellant's Brief, pp.24-25.) However, in State v. Sheahan, 139 Idaho 267, 281, 77 P.3d 956, 970 (2003), the Idaho Supreme Court found that "[t]he prosecutor's comments during closing argument that defense counsel had misled and lied to the jury were improper[,]" but did not rise to the level of fundamental error. In State v. Gross, 146 Idaho 15, 21, 189 P.3d 477, 483 (Ct. App. 2008), the misconduct by the prosecutor was extreme:

> The prosecutor repeatedly disparaged defense counsel, asked the jury to rely on the officer's and prosecutor's self-proclaimed trustworthiness and integrity and, most troubling, appealed to the emotion and passion of the jury by asking its members to step into the shoes of a hypothetical victim of Gross's alleged drunk driving. All of these improper arguments sought a finding of guilt based on factors outside the evidence. These arguments cumulatively rose to the level of fundamental error because even timely objections or curative instructions from the district court would not have removed the taint of the prosecutor's improper appeals to the emotion of the jury and other factors outside the evidence.

3. Even If One Or More Comments By The Prosecutor Were Inappropriate And Violated Anderson's Due Process Right To A Fair Trial, He Has Failed To Meet His Burden Of Demonstrating Prejudice Under *Perry*

Regardless of whether one or more of the prosecutor's closing argument comments rose to the level of a clear constitutional violation, he has failed to meet the third requisite for establishing fundamental error under Perry -- prejudice. Based upon the rendition of facts set forth in the "Statement Of Facts" in this Respondent's Brief, pp.1-7, *supra*, which is incorporated into the state's argument here, Anderson has failed to demonstrate that any one or more instances of misconduct by the prosecutor during closing argument affected his substantial rights by showing a reasonable probability that the misconduct affected the outcome of his trial. Perry, 150 Idaho at 226, 245 P.3d at 978.

In short, the state's evidence overwhelmingly shows that Anderson raped Stephanie. See State v. Watkins, 152 Idaho 764, 768, 274 P.3d 1279, 1283 (Ct. App. 2012) (strength of evidence is factor in harmless error analysis). Specifically, the state presented compelling evidence proving the sexual contact was not consensual: Stephanie's injuries, including bite marks to her finger, scratches on her waist and buttocks,[12] cuts and bleeding on her lips, and a large bruise on her chest, all buttressed her testimony that she was sexually assaulted; the disarray of the living area of Stephanie's trailer, including the overturned ashtrays and cigarette butts scattered over the floor, which was indicative of her having to fight to escape from Anderson;

[12] Notably, the somewhat vertical directions of the scratch marks on Stephanie's body are more consistent with her having been scratched by Anderson's fingers while he tried to pull her blue jeans off than by her being scratched by the shrubbery she ran past when she fled to the neighboring trailer. (See State's Exhibits 9-12, 14, 17-20.)

Stephanie's hysterical and upset emotional demeanor after the rape; Stephanie fled to the safety of the neighboring trailer totally naked from the waist down; and the fact that Stephanie's blue jeans -- with her underwear affixed to them in place -- were found by Officer Wiggins on the living room floor turned completely inside out in a manner consistent with being pulled off, just as Stephanie testified.

In contrast, Anderson's testimony was, to say the least, dubious. He testified that Stephanie communicated to him through a third party at the bar that (in essence) she wanted to have sex with him, and when he went to her trailer to see if that was true, she invited sexual intercourse by suddenly displaying her breasts to him. A jury would certainly notice that Anderson's version of events has the earmarks of non-subtlety and coarseness suggestive of a sexual fantasy. Similarly, Anderson's testimony that Stephanie cut her lip when his head hit her lip during "bumping and grinding" sexual activity, and she simply "laughed it off" when he brought it to her attention stretches the borders of credulity, especially in light of the number and nature of the cuts inflicted on Stephanie's lips. (#36319 Tr., vol. 2, p.253, L.20 – p.254, L.6; see n.3, supra.)

A prosecutor's arguments, often given spontaneously in the heat of action, should not be given their most damning meaning. Donnelly v. DeChristoforo, 416 U.S. 637, 646-47 (1974). Even assuming that one or more of the prosecutor's comments were not only improper, but rose to the level of being prohibited by the right to due process, Anderson has failed to demonstrate that the outcome of his trial would have been different without such error(s). Anderson has therefore failed to show fundamental error, much less that the prosecutor's comments were unconstitutional in scope.

III.

Anderson Has Failed To Show Cumulative Error

Anderson argues that, even if each of the instances of alleged prosecutorial misconduct did not amount individually to reversible error, "the above errors, when aggregated, show the absence of a fair trial in contravention of his constitutional right to due process." (Appellant's Brief, p.29.) Anderson's argument fails because he has failed to show that the cumulative effect of errors deprived him of a fair trial.

Under the doctrine of cumulative error, a series of trial errors, harmless in themselves, may in the aggregate show the absence of a fair trial. State v. Martinez, 125 Idaho 445, 453, 872 P.2d 708, 716 (1994). A necessary predicate to application of the cumulative error doctrine is a finding of more than one error. State v. Hawkins, 131 Idaho 396, 958 P.2d 22 (Ct. App. 1998). The cumulative error analysis does not include errors neither objected to nor found fundamental. Perry, 150 Idaho at 230, 245 P.3d at 982.

Because none of the prosecutor's comments were objected to at trial, and none of the claimed errors constitute fundamental error, the cumulative error doctrine does not apply.

CONCLUSION

The state respectfully requests this Court to affirm Anderson's conviction and sentence.

DATED this 11th day of March, 2013.

JOHN C. McKINNEY
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this 11th day of March, 2013, served a true and correct copy of the attached BRIEF OF RESPONDENT by causing a copy addressed to:

BRIAN R. DICKSON
DEPUTY STATE APPELLATE PUBLIC DEFENDER

to be placed in The State Appellate Public Defender's basket located in the Idaho Supreme Court Clerk's office.

JOHN C. McKINNEY
Deputy Attorney General

JCM/pm